SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

----------x

ROY DEN HOLLANDER,

Plaintiffs,

Index No. 152656/14

-against-

TORY SHEPHERD, ADVERTISERS NEWSPAPERS PTY LIMITED., AMY McNEILAGE, FAIRFAX MEDIA PUBLICATIONS PTY LIMITED,

Defendants.

----------x

JENNIFER G. SCHECTER, J.:

Defendants move to dismiss the complaint pursuant to, among other sections, CPLR 3211(a)(8). Their motion is granted.

Background

Plaintiff Roy Den Hollander (Den Hollander) is a New-York County resident (Bolger Aff, Ex 1, Amended Complaint [Complaint] ¶ 21). In 2014, he commenced this action against (1) Tory Shepherd (Shepherd), the Political Editor of *The Advertiser-Sunday Mail Messenger* (*The Advertiser*) (*id.* at ¶ 22), (2) Advertiser Newspapers Pty Ltd. (Newspapers), "which does business under the name of *The Advertiser-Sunday Mail Messenger*" (Complaint at ¶ 23), (3) Amy McNeilage, the Education Reporter for *The Sydney Morning Herald* (*The Herald*), which is part of Fairfax Media Publications Pty Limited (Fairfax) (*id.* at ¶¶ 24-25) and (4) Fairfax. All of the defendants are based in Australia.

Den Hollander claims that because of newspaper articles that Shepherd wrote in *The Advertiser* and an article that McNeilage wrote in *The Herald*, he and his copyrighted

property--"Males and the Law," a section of a Males-Studies course that he was supposed to teach at the University of South Australia (University)--were damaged. He claims that because of the articles, the University canceled his course, causing him to lose up to $1,250 in compensation. He further alleges that an article written by Shepherd in June 2014 damaged his reputation. In his amended complaint, Den Hollander asserts causes of action against all of the defendants for "injurious falsehoods, tortious interference with a prospective contractual relation and *prima facie* tort" (Complaint at 1). He also asserts a libel claim against Shepherd.

Defendants move to dismiss for lack of personal jurisdiction. In support of the motion, Shepherd states that she wrote articles about the prospective male-studies course, which appeared in *The Advertiser* and were available on its website (Bolger Aff, Ex 3 [Shepherd Aff] at ¶¶ 4-9). She explains that the articles were related to a controversy in Australia and "were directed at an Australian audience" (*id.* at ¶ 9). Shepherd asserts that, in researching the article, she sent one email to Den Hollander "requesting comment on the controversy" and spoke to him by telephone (*id.* at ¶¶ 11-12). In connection with her articles, she also exchanged several emails with a professor in New York (*id.* at ¶ 14). She swears

that besides the emails with the professor, "the email sent to Mr. Den Hollander, and the single telephone call with Mr. Den Hollander," she had no contact with anyone else in New York in preparing the articles (*id.* at ¶ 15).

McNeilage swears that her piece was intended to target an Australian audience and that she "made no contact with anyone in the United States or New York in the process of reporting on the controversy" (Bolger Aff, Ex 5 at ¶¶ 5, 7).

Defendants also submit affidavits from employees of Newspapers and Fairfax who swear that their newspapers are targeted to Australians, published in Australia and are available online. Michael Cameron, counsel to Newspapers, swears that Newspapers "does not publish in New York and does not directly sell any products in New York" (Bolger Aff, Ex 2 at ¶ 7). Richard Coleman, a Solicitor of Fairfax, swears that Fairfax and *The Herald* "do not directly publish in New York and do not sell any products in New York" (Bolger Aff, Ex 4 at ¶ 4). He explains that Fairfax has a contract with an independent company that prints copies of *The Herald* to be distributed in the United States, but neither Fairfax . . . nor *The Herald* . . . has any control over whether copies printed by [the independent company] are distributed in New York" (*id.* at ¶ 5). Coleman also swears that *The Herald* "formerly had correspondents in New York City, but has not

done so since 2012, almost two years before the Article was published" (*id.* at ¶ 8). The newspaper defendants both make plain that they have no offices or employees in New York and do not target New York (Bolger Aff, Ex 2 at ¶¶ 9-11; Ex 4 at ¶¶ 6,8).

In opposition to the motion, Den Hollander urges that the newspapers have global ties and have written articles about New York (Affidavit in Opposition [Opp Aff] at ¶¶ 22, 24, 32, 35). He emphasizes that the allegedly defamatory articles were available on the newspapers' interactive websites and on apps and that the websites give the newspaper defendants a "virtual office in the State" (Opp at ¶¶ 36, 38, 43, 53, 123). He seeks discovery to ascertain whether defendants expected publication of the article to have consequences in New York, to explore the newspaper defendants' relationships with advertising representatives, affiliates and agents and to see if defendants pay taxes in New York (*id.* at ¶¶ 31, 37, 40, 41). He maintains that there is jurisdiction in New York based on CPLR 302(a)(1) and (a)(3) (Opp at ¶¶ 87-166). Based on precedent, the Court disagrees.

Analysis

CPLR 302 sets forth acts that can serve as a basis for obtaining jurisdiction over non-domiciliaries in New York (*SPCA of Upstate N.Y., Inc. v American Working Collie Assn.*,

18 NY3d 400, 403-404 [2012]). Generally, long-arm "jurisdiction can be premised on the commission of a tortious act—perpetrated either within the state or outside the state, causing injury within the state" (*id.* at 403). Defamation, however, is specifically carved out of the rule "to reflect the State's policy of preventing disproportionate restrictions on freedom of expression" (*id.* at 404; *see also Legros v Irving*, 38 AD2d 53, 56 [1st Dept 1971] [Advisory Committee did not "wish New York to force newspapers published in other states to defend themselves in states where they had no substantial interests"], *appeal dismissed* 30 NY2d 653 [1972]).

Long-arm jurisdiction in defamation actions is governed by CPLR 302(a)(1), which provides that a court may exercise personal jurisdiction over a non-domiciliary that "transacts any business within the state" so long as the cause of action arises from the in-State activity. "New York Courts construe 'transacts any business within the state' more narrowly in defamation cases than they do in the context of other sorts of litigation" (*SPCA of Upstate N.Y., Inc.*, 18 NY3d at 405; *Best Van Lines, Inc. v Walker*, 490 F3d 239, 248 [2d Cir 2007]).

Particular "care must be taken to make certain that non-domiciliaries are not haled into court in a manner that potentially chills free speech" (*SPCA of Upstate N.Y., Inc.*, 18 NY3d at 406). There must therefore be a showing that

defendants engaged in purposeful activities within the State that would justify bringing them before New York courts and that there is a "substantial relationship" between these in-State activities and the defamation (*id.* at 404). When contacts are not directly related to the defamatory statements, defendants have prevailed in obtaining dismissal on jurisdictional grounds (*id.*).

There is no jurisdiction over Defendants in New York. The contacts here "are not as significant as the few cases finding long-arm jurisdiction when defamation was asserted" (*see SPCA of Upstate N.Y., Inc. v American Working Collie Assn.*, 74 AD3d 1464, 1466 [3d Dept 2010], *affd* 18 NY3d 400, 403-404 [2012]; *see also Trachtenberg v Failedmessiah.com* 4 F Supp 3d 198, 202 [EDNY 2014] [stating that New York courts have only found transaction of business in New York in satisfaction of CPLR 302(a)(1) "when the content in question was based on research physically conducted in New York"]).

In *Montgomery v Minarcin*, for example, it was undisputed that "all of the operative facts giving rise to plaintiff's claims occurred in this State. The television news reports were broadcast by Minarcin in this State . . . [and the] newscasts were researched, written, produced and reported by Minarcin in this State" (263 AD2d 665, 667 [3d Dept 1999]). Minarcin "extensively investigated" the reports over a six-

week period in New York, interviewing New York residents and elected officials and reviewing documents located in New York. These activities were deemed substantial enough for purposes of concluding that Minarcin transacted business in New York "within the intendment of CPLR 302(a)(1)" (*id.* at 668).

Similarly, in *Legros v Irving*, New York jurisdiction was upheld as it was "clear that virtually all the work attendant upon publication of the [allegedly defamatory] book occurred in New York. The book was in part researched in this State by defendant . . . ; negotiations with McGraw-Hill [the publisher and distributer] took place in New York; the contract with McGraw-Hill was executed in New York [and] the book was printed in New York" (38 AD2d at 56).

Here, in stark contrast, defendants have very minimal, attenuated New York contacts. The only defamation-related contacts with New York were Shepherd's limited emails, which could have been retrieved by their recipients wherever they may have been, and her phone call to Den Hollander. She was never physically present in the State and no research or other work was performed by anyone associated with Newspapers in New York. McNeilage had no arguable contact whatsoever with New York. Defendants certainly did not engage in any activities within New York related to the allegedly defamatory articles whereby they invoked the benefits and protections of New

York's laws (*see Best Van Lines, Inc.*, 409 F3d at 249 ["courts have found jurisdiction in cases where the defendants' out-of-state conduct involved defamatory statements projected into New York and targeting New Yorkers, but only where the conduct also included something more"]; *Symmetra Pty Ltd. v Human Facets, LLC*, 2013 WL 2896876 at *9 [SDNY 2013] [controlling "precedent establishes that jurisdiction over a claim for defamation will lie (under CPLR 302[a][1]) only if the plaintiff shows that: (1) the defamatory utterance was purposefully directed at New York, as opposed to reaching New York fortuitously; and (2) the defendant transacted other business in New York that was directly connected to the claim asserted"]; *see also see Talbot v Johnson Newspaper Corp.*, 71 NY2d 827, 829 [1988] [no jurisdiction over individual who participated in phone interview from California]; *Trachtenberg v Failedmessiah.com* 4 F Supp 3d at 204 [reliance on a New York source and research through a New York State Court website insufficient]).

Courts, moreover, have repeatedly held that placement of defamatory content on the internet and making it generally accessible to members of the public does not constitute transaction of business in New York even when it is likely the material will be read by New Yorkers (*see e.g. SPCA of Upstate N.Y., Inc.*, 18 NY3d at 402 [no personal jurisdiction in action

based on placement of comments on a website despite the fact that defendant had members in New York]; *Best Van Lines, Inc.*, 409 F3d at 250; *Rakofsky v The Washington Post*, 39 Misc 3d 1226[A] [Sup Ct, NY County 2013] ["it is insufficient to gauge the overall commercial activity of the defendant on its website alone, without determining whether such purposeful activities in this state were substantially related to the defamatory statements"--there were no purposeful activities in the State as "defendants neither wrote the alleged defamatory statements in this state nor did they direct them to our state alone" the "statements were posted on the internet with potential world-wide accessibility"]).

In the end, there is no authority for subjecting defendants to jurisdiction in New York based on articles published outside New York for a non-New York audience. Shepherd's phone calls and emails do not allow the court to hale her into this forum and McNeilage has zero contacts with the State. Potential relationships that the newspaper defendants have with other entities are unavailing as no purposeful New York contacts are alleged <u>that are substantially related to the defamation</u>. Therefore, there is no basis for granting discovery or a hearing/trial limited to personal jurisdiction (*Findlay v Deadhead*, 86 AD2d 789, 791 [1st Dept 1982]).

In fact, much of the discovery that plaintiff seeks is relevant only if CPLR 302(a)(3) were applicable and it is not regardless of how his causes of action are denominated (*see Cantor Fitzgerald, L.P. v Paisley*, 88 F3d 152, 157 [2d Cir 1996] [CPLR 302(a)(2) and (3) inapplicable to injurious falsehood and tortious interference with prospective economic advantage causes of action as plaintiffs "may not evade the statutory exception by recasting their cause of action as something other than defamation"]; *Reich v Lopez*, 38 F Supp 3d 436, 458-459 [US Dist Ct, SD NY 2014]; *cf. Perez v Violence Intervention Program*, 116 AD3d 601, 602 [1st Dept 2014]; *Entertainment Partners Group, Inc. v Davis*, 198 AD2d 63, 64 [1st Dept 1993]).

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted and the complaint is dismissed in its entirety with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision, Order and Judgment of the Court.

Dated: January 8, 2016

HON. JENNIFER G. SCHECTER